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Favourable Tax Regimes that Constitute Selective State Aid from the Perspective of the Cjeu Recent Case-Law

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Abstract:

The issue of state aid is crucial for the EU Member States that are implementing favorable tax regimes to foster investments and business activities performed by their tax resident companies. Up until recently, according to the General Court of the Court of Justice of the European Union (hereinafter – CJEU), where the European Commission (EC) has been assessing whether a specific tax measure qualifies as a state aid, it had been required to prove that such measure favors certain undertakings capable of identification because of characteristics specific to them that other undertakings do not possess. This approach has changed by the Judgment of the Court of Justice delivered on 21 December 2016 in joined cases C-20/15 P and C-21/15 P with which the EC burden of proof has been substantially eased in classifying measure at issue as selective.

The aim of the research is, by researching the reasoning behind the conclusion reached by the Court of Justice and jurisprudence on fiscal state aid, to evaluate whether any fiscal measure introduced in the future that is not exempt under de minimis provision or other exemptions eventually may be classified as selective.

Main research methods are legal theory research as well as applied law reform research. Theoretical research underlying the paper is focused on the analysis of the CJEU case-law related to the judgment, as well as the analysis of related publications and opinions, whereas the applied law research includes the analysis of social and economic impact of the CJEU and EC position on state aid in fiscal measures. The findings of the research determine to what extent the EC will have more leeway in investigations into state aid tax measures as it will not have to identify a specific category of beneficiaries. In its conclusion, the paper addresses the question of whether the EU Member States may practically in the future implement any fiscal favorable regime (and maintain existing ones) without a risk of the regime at issue being classified as selective.

Keywords: *amortization of goodwill, selective measure, state Aid, tax subsidies in the EU*
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1. Introduction

On 21 December 2016, the Grand Chamber of the Court of Justice of the European Union (hereinafter – CJEU) has laid down a judgment in Joined Cases C-20/15 P Commission v World Duty Free Group (formerly Autogrill España SA) and C-21/15 P Commission v Banco Santander SA and Santusa Holding SL concerning a Spanish corporate tax scheme on amortisation of financial goodwill resulting from shareholding in a foreign company of at least 5% and holding it without interruption for at least one year. Based on the appeals from the EC, the CJEU has set aside the judgments of the General Court of the European Union and has upheld the position of the EC, reverting the cases to the General Court. This judgment is a significant new cornerstone in the development of the jurisprudence interpreting the notion of selectivity in context of State Aid in the EU.

The importance of the judgment lies in fact that this time the CJEU has broadened the meaning and scope of application of selectivity to cases when a measure benefits only companies that carry out certain transactions, even if the measure, in principle, is open to all companies. The judgment was welcomed by the EC, impacting future decisions in all State Aid cases, not only to fiscal aid situations, in a way that the EC is no longer required to perform such a thorough selectivity argumentation in State Aid decisions as was established by previous case-law exempting the general aid measures.

In today's world, when even after the EC decisions in cases like Fiat, Starbucks and McDonald's, tax ruling practices in some countries are still widely used to attract foreign investors, the tax benefits in domestic systems of the Member States (especially with small domestic economies) remain crucial factors characterizing the investment landscape and fostering the investments. Thus, it is important for existing and future fiscal (and not only fiscal) aid measures that can be introduced by the Member States to be designed taking into account the new approach to the criterion of selectivity.

Thus, the research question to be answered is to what extent the newly adopted interpretation of aid measure as selective may preclude introduction of new (fiscal) aid measures and maintenance of existing ones. The findings of the paper should lead to a discussion on whether the broadened interpretation of measure as selective does not jeopardize tax sovereignty of the Member States.

The aim of the research is, by researching the reasoning behind the conclusion reached by the Court of Justice and jurisprudence on fiscal state aid, to evaluate whether any fiscal measure introduced in the future that is not exempt under *de minimis* provision or other exemptions eventually may be classified as selective. The tasks of the research:

1) To make an overview of the Spanish financial goodwill amortisation measure;
2) To scrutiny the selectivity criteria in the EU State Aid, to provide a summary of the publications and case-law analysed;
3) To determine why the Spanish financial goodwill amortisation measure has been qualified as a selective measure from the point of view of the CJEU despite of the previous decisions of the General Court; and
4) To conclude whether the judgment of the CJEU provides more leeway for the European Commission in future State Aid cases and how the Member States should take it into the account.

The subject of the study in broad sense is the Member States' taxation measures and their conformity with the EU State Aid regulations, and in narrow sense – application of principle of selectivity of a tax measure on the example of the Spanish goodwill amortisation case. The paper attempts to answer the question of whether the CJEU judgment in the Spanish goodwill amortization case follows the previous case-law in the field of State Aid, as well what are the grounds for the broader understanding of the selective taxation measure. The limitations of the paper are:

1) The paper will not include an in-depth analysis of the goodwill concept;
2) The paper will not include comparable analysis of the financial goodwill amortization measure from economic or legal perspective;
3) The paper also will not lay down an opinion on the application of the selectivity criteria in State Aid analysis.

The CJEU judgment under analysis is very recent and is not yet widely addressed by the scholars, but its importance for the future development of the State Aid application practice of the EU Commission is very high since it allows the Commission to claim that a measure is applicable only to certain undertakings without having it proved in law or in fact. The problem faced in the research is certain inconsistency that already exists in the case-law of the CJEU on the selectivity criterion and definition of economic advantage. The paper should contribute to the discipline by describing the reasoning of the EU Commission, involved parties, the General Court and the CJEU applied in the case, provoking a theoretical discussion on whether such a broad interpretation of the selectivity of a given tax measure is appropriate in light of the existing case-law and actual facts of the given case.

Having briefly described the Spanish goodwill amortisation measure, the paper provides overall description of the selectivity criterion as established in the case-law of the CJEU and then focuses on the dispute of whether the given Spanish legislation was or was not selective. Main research methods of the paper are legal theory research as well as applied law reform research.

2. Spanish rules on amortisation of financial goodwill

It should be noted that an efficient state regulation and business activity support system is one of top priority factors to successful innovative development (Nechaev and Antipina, 2016) and the overall efficiency of government controls over innovative countries in Western Europe are generally higher than in other regions of the world (Zakharova *et al.*, 2015).

There are differences between the various categories of the EU Member States, including differences in design, functionality, stability and benefits of tax regimes. These differences reflect the different structures of tax revenues of the countries, and are the main reason why the Common Consolidated Tax Base solution has not been implemented in the European Union. With some similarities of the overall composition of the tax revenue, Low homogeneity exists for the volumes of corporate income between the EU Member States. Cyprus, Malta and Luxembourg as international corporate centres have high level of volumes and from the other hand Germany has the lowest volume as % of GDP form all other countries (Liapis *et al.*, 2012; Liapis and Thalassinos, 2013).

While goodwill generally is characterized as an intangible, it is still not a universal notion. Its treatment differs across countries and is regulated differently for legal, accounting and tax purposes. The common definition for accounting purposes is given by IFRS 3: "[…] goodwill is measured as the difference between:

1) the aggregate of (i) the value of the consideration transferred (generally at fair value), (ii) the amount of any non-controlling interest (NCI […]), and (iii) in a business combination achieved in stages […], the acquisition-date fair value of the acquirer's previously-held equity interest in the acquiree, and
2) the net of the acquisition-date amounts of the identifiable assets acquired and the liabilities assumed (measured in accordance with IFRS 3).

Such a difference, when calculated, is not necessarily positive, and it is recognisable as an intangible asset for financial and tax accounting purposes. The role of goodwill in accounting of acquisitions rose in period from 2001 to 2005, when after a change of accounting approach, up to a half of acquisition price was accounted as goodwill and subsequently impaired (Gomes, 2012; Vovchenko *et al.*, 2017).

Whereas certain countries do not recognise goodwill as an intangible asset for tax amortisation purposes, in most cases there is an excess of the cost of acquiring the business over the value of the net assets acquired, and several governments in the European Union acknowledge the importance of allowing acquirers to amortize this excess as an intangible asset. For example, Hungary and the Netherlands nowadays allow the amortisation of goodwill for tax purposes limited to 10% of the purchase price per annum. Similar amortisation rights are also foreseen for the taxpayers in

Poland, Germany and Spain, and may be indirectly provided also by the law or practice of other Member States of the European Union (PriceWaterhouseCoopers, 2017).

The impact of applying goodwill amortisation is the decrease of the tax burden for taxpayers, and it is a tax incentive from this perspective. Thus, right for goodwill amortisation is an important tool in providing legal tax benefits to the taxpayers. There’s no doubt that taxes are an important burden, because they reduce the return to, and / or increase the cost of entrepreneurial activity. Lower returns reduce the possibility for enterprises to undertake investment and create employment. On the contrary low taxes allow them to expand and create growth. Although this statement has a number of weaknesses and is not a single aspect impacting the investment climate in a given country, it cannot be denied that tax benefits play an important role in overall context (Glykou and Siokorelis, 2013).

Article 12(5) of the Spanish Corporate Corporate Tax Act (Ley del Impuesto sobre Sociedades, hereinafter TRLIS) was introduced into the Spanish tax system by Article 2(5) of Act 24/2001 of 27 December 2001 amending the TRLIS. Royal Legislative Decree No 4/2004 of 5 March 2004 consolidated the amendments made until then to the Spanish Corporate Tax Act in a recast version. Article 12(5) of TRLIS entered into force on 1 January 2002. While the Spanish corporate tax policy in general at that time foreseen that the financial goodwill can only be amortised following a business combination that arises either as a result of acquisition or contribution of the assets held by independent companies or following a merger or de-merger operation, the newly introduced Article provided that a company which is taxable in Spain may deduct from its taxable income the financial goodwill deriving from the acquisition of a shareholding of at least 5% of a foreign company, in equal yearly instalments, for up to 20 years following the acquisition.

The term “financial goodwill” means the goodwill that would have been booked if the shareholding company and the target company had merged. The concept of financial goodwill under Article 12(5) TRLIS introduced into the field of share acquisitions a notion that is usually used in transfer of assets or business combination transactions. According to Article 12(5) TRLIS, the financial goodwill is determined by deducting the market value of the tangible and intangible assets of the acquired company from the acquisition price paid for the shareholding. In addition, the amortisation of financial goodwill as introduced in 2001 was dependent on meeting number of requirements, as set by reference to Article 21 TRLIS:

1) the direct or indirect holding in the foreign company must be at least 5% and must be held for an uninterrupted period of at least 1 year;
2) the foreign company must be liable for a similar tax to that applicable in Spain;

3) the revenue of the foreign company must mainly derive from business activities carried out abroad.

Upon initiation of formal investigation procedure by the Commission, the mentioned Article 12(5) of TRLIS was repealed by the end of 2008. The measure itself was unique in a sense that, among other measures aimed at stimulation of international expansion of domestic companies implemented by various EU Member States, the Spanish measure supported it in an indirect way through acquisition of shares of foreign entities.

The main difference with other regimes that in one way or another allow amortising the goodwill for tax purposes, the Spanish rules have only been granting a benefit to the companies that invested in foreign subsidiaries. Also, in unique way, Article 12(5) of TRLIS has allowed to account for goodwill for tax purposes in the cases with the share deals, instead of acquisition of goodwill as an intangible asset, which typically arises from mergers and acquisitions. In author's opinion, such a measure for support of international expansion is a good example of exercise of tax sovereignty by an EU Member State.

As known from the research materials, the biggest beneficiaries of the financial goodwill amortisation measure were: Banco Santander, World Duty Free Group (previously Autogrill) and Santusa Holding. These conglomerates represent two economic sectors, such as financial sector and travel retail trade (Santusa Holding is operating under the ownership of Banco Santander and provides, through its subsidiaries, financial services). There were also other 30 interested parties that have been participating in the goodwill amortisation scheme and that have, later on, submitted their comments on the Commission's decisions.

The below analysis of the State Aid aspects applicable to the Spanish goodwill amortisation measure is made understanding that the measure itself was adopted prior to the financial crisis of 2008 when specific aid measures were individually agreed with the Commission with benefit for banking sector. It needs to be mentioned also that the Commission investigation has started not due to notification from Spain, which is required as an EU Member State to consult state aid measures prior to their implementation, but based on the investigation request letters from certain Members of European Parliament.

3. Concept of selective measure under the EU State Aid rules

In order to clarify why the CJEU judgment in the Spanish financial goodwill amortisation case is of high importance one should first refer to the up-to-date jurisprudence in the State Aid area. Following Article 107(1) of the TFEU, *"Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods* *shall, in so far as it affects trade between Member States, be incompatible with the internal market"*. It is obvious and follows from the settled practice that any types of tax measures may also well fall under the definition of the State Aid as they provide various kinds of benefits from the State resources – a tax rebate, tax refund, exemption etc. Thus, to qualify as State Aid, the following cumulative conditions have to be fulfilled:

1) A measure must be granted out of State resources;
2) It must confer an economic advantage to undertakings;
3) The advantage must be selective;
4) The measure must distort or threaten to distort competition and it must affect intra-EU trade.

Whilst a tax amortisation is granted from the State resources since it decreases the tax revenue collected by the State and that a more beneficial taxation of undertakings is able to distort the competition between economic operators located in various Member States (tax competition phenomenon between the Member States), it is much less clear whether specific measure confers an economic advantage and it is even less clear which measures are selective and which are not.

The selectivity criterion is usually the most difficult question in a State Aid assessment of tax measures. Selectivity is assessed in two steps: first, whether the tax measure is materially selective, and if yes – then, second, whether the measure can be justified by the nature and logic of the tax scheme. Material selectivity may be established in law or in fact, and it may result from criteria of application of a measure, such as legal form, size, industry or other conditions that can only be fulfilled by particular undertakings. If, on the other hand, all undertakings may benefit from a measure, then it is a general measure rather than selective one (Rydelski, 2010).

As stated by the Commission already in 1998, "*Tax measures which are open to all economic agents operating within a Member State are in principle general measures. They must be effectively open to all firms on an equal access basis, and they may not de facto be reduced in scope through, for example, the discretionary power of the State to grant them or through other factors that restrict their practical effect. However, this condition does not restrict the power of Member States to decide on the economic policy which they consider most appropriate and to spread the tax burden as they see fit across the different factors of production. If they apply without distinction to all firms and to the production of all goods, the following measures do not constitute State aid:*

— *tax measures of a purely technical nature (for example, setting the rate of taxation, depreciation rules and rules on loss carry-overs; provisions to prevent double taxation or tax avoidance),*

— *measures pursuing general economic policy objectives through a reduction of the tax burden related to certain production costs (research and development (R&D), the environment, training, employment)*."

Following the Commission's practice, it is of outmost importance that in order to determine whether the measure at issue is materially selective, it has to be established whether, within the context of the particular tax system, the measure constitutes an advantage for certain undertakings in comparison with others that are in similar legal and factual situation. As mentioned by the scholars, a tax measure in order to be classified as a general measure needs to cover a broad category of transactions in a non-discriminatory manner, and that any discrimination that cannot be justified by objective differences between the taxpayers would lead to a distortion of competition (Micheau, 2008).

Since the assessment of selectivity for a tax measure involves drawing distinction between general system and specific measure, it is crucial to understand what is meant by "general tax system" and "tax exception". Although the CJEU has from case to case been using various terminologies in application of the so-called "derogation test", and there has been debate on whether this inconsistency should be considered as application of different approaches, it may be concluded that if there is a difference of treatment in favour of the recipients of the measure when compared to the other undertakings in a similar situation, then it can be concluded that the measure constitutes derogation that departs from the general system.

Furthermore, since the very first CJEU judgment on the application of the derogation test, it has been stated that a selective aid measure may be justified on the basis of nature or general scheme of the system. In tax matters, there are two types of the justifications that may be invoked by the Member States: the one based on the principle of tax neutrality, which aims at banning any tax distortion of the tax system, and the other one which is aimed at combating tax avoidance. Although the wording of Article 107 does not provide for any kinds of justifications apart from derogations laid down in Articles 107(2) and (3), such an approach has been developed and maintained by both the Commission and the CJEU. It is alleged that such additional justification measures are required to mitigate potential adverse effects of the rigorous derogation test (Rydelski, 2010).

There is certain criticism when it comes to the selectivity criteria when applied to the tax matters, since certain drawbacks and uncertainty may arise due to the complexity of the taxation field because there is confusion between the selectivity and advantage, difficulty in comparing two tax treatments and the necessity to find a balance for the derogation test. Since determination of existence of the advantage and the selectivity of the measure relies on the same approach, namely, a comparison that should be made between the tax treatment provided by the measure in question and tax treatment under general regime, both the CJEU and the Commission do not maintain that the difference in this aspect needs to be clear-cut.

Another complexity in application of the derogation test arises from attempts to identify which criteria needs to be used to determine to what extent two fiscal situations can be regarded as alike and comparable for State Aid purposes. In addition, there also exists a problem of defining the general tax system for assessing the selectivity of the tax measure. In dealing with these complexities, the Commission and the CJEU has applied a strict approach, whereby a tax measure is considered selective where it effectively favours certain undertakings over others, regardless of the number of undertakings concerned, the sectors involved or the activities carried on. In this complex context, justification of selective measures appears to be a last resort to exempt a measure from being confirmed to qualify as a State Aid, and, given the complexity of the State Aid case-law itself as well as of the taxation field, defining the market concerned to which the derogation test should be applied and where the justifications may be sought, often creates obstacles in clear understanding of how Article 107(1) of the TFEU needs to be applied (Rydelski, 2010).

4. Alleged State Aid and selectivity of the Spanish regime

In its decision initiating the investigation, the Commission considered that the measure in question departed from the ordinary scope of the Spanish corporate tax system, which is the tax system of reference. The Commission also held that the tax amortisation of the financial goodwill resulting from the acquisition of a 5% shareholding in a foreign target company seemed to constitute an exceptional incentive. The Commission observed that the tax amortisation was available only to a specific category of undertakings, namely undertakings which acquire certain shareholdings, amounting to at least 5% of the share capital of a target company, and only in respect of foreign target companies.

Referring to the basics of the State Aid policy in the business taxation, "*The fact that some firms or some sectors benefit more than others from some of these tax measures does not necessarily mean that they are caught by the competition rules governing State aid. Thus, measures designed to reduce the taxation of labour for all firms have a relatively greater effect on labour-intensive industries than on capital-intensive industries, without necessarily constituting State aid. Similarly, tax incentives for environmental, R&D or training investment favour only the firms which undertake such investment, but again do not necessarily constitute State aid.*"

It is interesting to mention in this relation that a year before the Commission has adopted its decision initiating an investigation into the Spanish financial goodwill amortisation case; it has also delivered another decision on Spanish regime which provided 50% reduction on the revenue from certain intangible assets. This decision is important and interesting not only because it is one of the handful of decisions where the Commission has decided that the measure in question does not constitute a State Aid (Rydelski, 2010) but also because the measure itself is comparable to the one with amortisation of financial goodwill – in both cases the Commission has found a derogation from the ordinary corporate taxation rules, as well as it has determined an existence of an advantage. Thus, existence of a selective advantage was crucial in deciding whether the measures constitute State Aid.

Nevertheless, Commission's conclusions in both cases differ. In its decision on the Spanish scheme for intangible assets the Commission states: *"[...] the fact that not every undertaking decides to self-develop a qualifying intangible asset and then receives remuneration for the transfer of the right to use or exploit such asset merely reflects an economic reality. More importantly, the measure does not strengthen the position of any particular class of undertakings in relation to others competing in intra-Community trade and applies without distinction to all economically active persons. In line with Commission Communications on direct business taxation and the effective use of tax incentives in favour of R&D tax measures which are open to all economic agents operating within a Member State are in principle general measures."*

In contrast, in the Spanish financial goodwill amortization case, despite the arguments provided by the Kingdom of Spain and 30 interested parties, the Commission has concluded that *"[although Article 12(5) TRLIS is drafted to apply to all operators established in Spain, in practice only a limited and identifiable number of companies with a Spanish tax base, which make foreign acquisitions in the relevant tax year and have a sizeable tax base against which to offset the financial goodwill deduction, can benefit from the application of the measure on an annual basis. As a result, the measure at issue in fact gives a different tax treatment even to Spanish operators in the same position of making acquisitions abroad."* In its reasoning, the Commission has referred to the CJEU judgment in case of export aid for steel undertakings, stating that *"a tax reduction favouring only exports of national products constitutes State aid"* and *"[d]espite the arguments put forward by the Spanish authorities that the measure at issue in the latter case is not selective because Article 37 TRLIS applies to all Spanish undertakings that invest internationally, the Court concluded that the measure constituted State aid since it was limited to one category of undertakings, namely undertakings making certain international investments"*.

Without going into the details of the proceedings in the General Court that were initiated by an application lodged by World Duty Free Group SA, Banco Santander SA and Santusa Holding SL, the General Court has dismissed the Commission's decisions on the grounds that the Commission has erred in application of Article 107(1) of the TFEU. The judgment of the General Court, being grounded by the numerous judgments of the CJEU, has stated that *"the category of export undertakings — even though it is, in the same way as, for example, the category of undertakings manufacturing goods [...] extremely broad — must be regarded as comprising undertakings which can be distinguished on account of common characteristics linked to their export activity*", as well as that "*[t]he case-law cited* *in paragraph 82 above, regarding undertakings with export activities, thus does not make it possible to conclude that the EU courts classified a tax measure as selective without the identification of a particular category of undertakings or the production of certain goods which could be distinguished on account of their specific characteristics."*

The final word in the dispute of whether the financial goodwill amortisation case was or was not selective measure that constitutes the State Aid was put by the CJEU in its judgment dated 21 December 2016. The CJEU has stated that the General Court has clearly misapplied the selectivity condition laid down in Article 107(1) TFEU. Without discussing the wording and peculiar reasoning of the CJEU, the message is that the economic operators who were not acquiring the shares of the foreign subsidiaries were discriminated against those that were acquiring such shares, disregarding the fact that the tax measure at issue may not be elective. The CJEU went so far to provide an additional interpretation to the judgment of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, stating that *"[…] it cannot be inferred from paragraph 36 of the judgment of 8 November 2001, Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke (C-143/99, EU:C:2001:598), according to which measures are not selective where they apply to all the undertakings in the national territory, 'regardless of their activity', that a measure whose application does not depend on the nature of the undertakings' activity is, a priori, not selective.*"

In author's view, the most important finding of the CJEU is made in paragraph 86 of the judgment on financial goodwill amortisation: *"It follows that a condition for the application or the receipt of tax aid may be grounds for a finding that that aid is selective, if that condition leads to a distinction being made between undertakings despite the fact that they are, in the light of the objective pursued by the tax system concerned, in a comparable factual and legal situation, and if, therefore, it represents discrimination against undertakings which are excluded from it."* Such a finding allows, basically, to say that the companies that are not investing in foreign subsidiaries, gain an advantage against the companies that invest in the domestic subsidiaries, although there are in the same legal and factual situation. This finding substantiates all of the further CJEU's findings, leading to the following conclusion: *"the tax advantage conferred by the measure at issue can be obtained without any minimum investment requirement and without, consequently, the benefit of that measure being reserved to undertakings having sufficient financial resources, those factors do not preclude the possibility of that measure being classified as selective for other reasons, such as the fact that resident undertakings making acquisitions of shareholdings in companies resident for tax purposes in Spain could not obtain that advantage".*

5. Conclusions

The existing case-law of the CJEU and the Commission's practice in application of the derogation test in State Aid review of the fiscal measures left some space for a debate on whether there is single common approach to determine whether an economic advantage is conferred by a given measure and whether such an advantage is selective in facts. The case-law and the Commission's decisions are the main sources that the Spanish government and authorities (in the specific case), since the TFEU provides only general provision on State Aid prohibition.

Being guided by Article 107(1) of the TFEU which prohibits favouring certain undertakings or the production of certain goods, as well as relying on the developed case-law of the CJEU and the Commission practice to that date, it may be concluded in good faith that the measure, such as Spanish financial goodwill measure introduced in Article 12(5) of the TRLIS, was not designed in a discriminatory way nor it should have had as an effect a practical discrimination of certain undertakings over the others. The research did not show that there would be guidance available from the case-law or the Commission's practice to lead to a conclusion that the measure at question would be providing a selective advantage to certain category of undertakings, and thus should be considered a general measure which is not prohibited by the TFEU.

The Commission has alleged, and the CJEU has recently confirmed, that only certain large identifiable undertakings could potentially benefit from that measure. The Spanish authorities and the involved parties were not able to demonstrate and to prove that the measure had as its beneficiaries a broad unlimited scope of undertakings. Based on this, the Commission has maintained that there is no need to determine which particular category of undertakings is benefiting from the measure more that the others. The CJEU has approved such an approach, broadening the definition of selective advantage established by the previous case-law to the situations, where the undertakings that take decisions to invest in shares of foreign companies are in more advantageous position to those deciding to invest in domestic companies, even though Article 12(5) of TRLIS did not impose any limitations on the scope of application of the goodwill amortisation measure.

The judgment of the CJEU has an important impact on all future State Aid reviews performed by the Commission (not only with respect to the fiscal measures) since it will have more leeway in application of the derogation test and, strictly speaking, will not be required to identify specifically which category of the undertakings is treated more favourably.

The analysed judgment of the CJEU in Spanish financial goodwill amortisation case, in theory, will allow the Commission to conclude that any measure, stimulating certain economic operations, is a selective advantage. If certain measure in the future would (as a theoretical example) support investments in both domestic and foreign subsidiaries, the Commission may still argue that such a measure favours the undertakings that are in principle able to acquire shares in subsidiaries, as compared to those that decide to invest in manufacturing assets.

In overall, given that the analysed judgment of the CJEU may bring additional uncertainty into application and self-assessment of the fiscal measure which a Member State may wish to introduce, it is proposed that the Member States request the Commission to issue and additional revised notice on the application of the State Aid to the fiscal measures to provide clarity to the authorities of the Member States. In its notice, the Commission would need to provide guidance on the question of to what extent the definition of "category of undertakings" need to be broadened in application to the fiscal aid measures.

It is also proposed that prior to issuing such a notice the Commission opens a public consultation with the interested Member States as well as with the economic operators. One should also follow the proceedings in the General Court which will take place after the case being reverted by the CJEU, which may bring additional information for another analysis of the topic.

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